No. 81-2245

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Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA, *Petitioner,*

v.

UNITED STATES OF AMERICA
AND PYRAMID LAKE PAIUTE
TRIBE OF INDIANS, *Respondents.*

Amicus Curiae Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF THE AMICUS CURIAE

All water rights in the western states originate under either state or federal law. The uniform administration of state and federal water rights requires the adjudication of all water right claims in a single proceeding. The piecemeal adjudication of rights may prevent the proper allocation of water in times of shortage and increases the possible over-appropriation of limited water resources.

Ten water rights adjudication suits are now pending in New Mexico. Four were filed in state court and six were filed in federal court. All of these suits involve the adjudication of federal water rights. Seven suits involve the adjudication of water rights for 12 Indian tribes and 10,509 non-Indians and cover almost 20 percent of the land area in New Mexico. Five tribes have not intervened in suits that involve potentially conflicting federal purposes or interests. The holding of the Ninth Circuit Court of Appeals may affect the jursidiction to adjudicate federal and Indian water rights especially in four suits where the Indian tribes are not parties.*

SUMMARY OF ARGUMENT

The opinion of the court of appeals casts a cloud over the finality of decrees adjudicating federal water right claims when the attorneys for the United States represent potentially conflicting federal interests. The adjudication of federal reserved

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*These suits are: *State of New Mexico ex rel. Reynolds v. Abbott*, U.S.D.C. Nos. 7488 & 8650, filed in 1968 — the Pueblos of Santa Clara and San Juan and 2,550 defendants; *State of New Mexico ex rel. Reynolds v. Abeyta*, U.S.D.C. Nos. 7896 & 7939, filed in 1969 — the Taos Pueblo and 2,600 defendants; *State of New Mexico ex rel. Reynolds v. Aragon*, U.S.D.C. No. 7941, filed 1969 — the Pueblos of San Juan and Santa Clara, the Jicarilla Apache Tribe, and 1,400 defendants; *Anaya v. Public Service Co.*, Santa Fe County Cause No. 43,347, filed in 1975 — Cochiti Pueblo and 1,500 defendants.

water rights for an Indian tribe would be final only where the tribe is a party to the adjudication suit and represented by separate and independent counsel. If the tribe does not intervene and if sovereign immunity prohibits its joinder as a party, then the adjudication would not be binding on the tribe, the United States, or the water right owners in privity with the United States under federal reclamation projects.

ARGUMENT

THE COURT OF APPEALS' DECISION UNDERMINES THE JURISDICTION OF COURTS TO ADJUDICATE WATER RIGHTS BY CREATING AN UNAVOIDABLE LACK OF FINALITY IN THE ADJUDICATION OF FEDERAL WATER RIGHTS

The court's opinion consists of two holdings that form the horns of a logical dilemma. The dilemma arises from the fact that neither notice nor lack of notice of potentially conflicting federal water right claims can preclude the re-adjudication of those claims as between the United States and parties in privity with the United States.

In its first holding the court states that the doctrine of res judicata precludes the re-adjudication of claims that might have been previously litigated in the same cause of action. This claim-preclusion extends to persons who are in privity with parties to the previous action. The doctrine of res judicata would not apply if a party had notice that a representative party in the former action had not diligently prosecuted the claims of a non-party. (Nev. App. 229a.) The court held that this exception to the doctrine of res judicata does not apply because any impropriety in the government's representation of the Tribe's interests was not known to the defendants in the *Orr Ditch* case. (Nev. App. 238a.)

In its second holding the court ruled that the doctrine of res judicata does not apply to parties who were not adversaries under the pleadings in the previous litigation. While the court acknowledged that this adversity requirement should be relaxed in comprehensive water right adjudication suits, it concluded that such adversity should not be inferred where the interests of non-parties are represented by the same government attorneys. In such a case the adversity between the interests represented by the government attorneys must be established by the pleadings. (Nev. App. 245a.) The pleadings must explicitly state that the litigation will bind the represented non-parties *inter se*. The court held that since there was no such adversity under the pleadings in the *Orr Ditch* case, the final decree does not preclude the re-adjudication of water right claims between the non-parties represented by the United States.

The lack of knowledge or notice of conflicting interests is the basis for the court's application of res judicata to the rights of the *Orr Ditch* defendants, while the same lack of notice under the pleadings is the basis for the court's refusal to apply res judicata to the claims of non-parties represented by or in privity with the United States. Conversely, had the court found adversity under the pleadings, it would have held that res judicata did not apply to the *Orr Ditch* defendants because they would have had notice of the government's conflicting interests. This dilemma of the "faithless fiduciary" (Nev. App. 239a) is based upon the same legal conclusion being drawn from contradictory factual findings. Res judicata does not bar the re-adjudication of certain water right claims regardless of whether there was notice or lack of notice of potentially conflicting claims.

Apparently the court of appeals assumed that adversity under the pleadings meant that the "government intentionally represented conflicting interests." (Nev. App. 242a.) The court states that a tribe would not necessarily be bound by the adjudication of its water rights if the United States breached its

trust to the tribe while openly advancing its own interest. (Nev. App. 236a.) The court found in the *Orr Ditch* case that the United States "compromised its duty of undivided loyalty to the Tribe" by representing both the Tribe and the reclamation project. (Nev. App. 242a.) But since there was no adversity under the pleadings, the court did not find an impermissible conflict of interest or breach of trust. The court's opinion is based upon an impossible standard for the representation of interests by the United States.

In 1978 the five mainstream Colorado River Indian tribes filed motions to intervene in *Arizona v. California*, U.S. Supreme Court No. 8 Original. The tribes sought to intervene because they felt the United States had not and could not adequately represent their interests. The Special Master, Judge Elbert P. Tuttle, reported that potential conflicts of interest are "inevitable" in government litigation and that "were the United States a private attorney, [they] might constitute an ethical conflict." Memorandum and Report on Preliminary Issues dated August 28, 1979, in 6 *Indian Law Reporter* A-150, n. 18 (October 12, 1979). The Master stated that:

> When the United States litigates in its capacity as trustee for Indian tribes, it acts not merely on behalf of the Indians' proprietary rights, but also "the governmental rights of the United States." *Heckman v. United States*, 224 U.S. 438 (1912). It exercises the plenary powers of the United States to regulate Indian affairs. U.S. Const. Art. I, §8(3). As such, the United States answers to a different constituency than do the Tribes. In its representation of the Tribes, though it must reasonably fulfill the nation's trust obligations or face the prospect of liability for their breach, the United States also acts on considerations of Indian policy or other national concerns which may yield a different litigation position than the represented Tribes themselves would reach.

Id. at A-151 (footnotes omitted). The court should have used this broader standard in evaluating the propriety of the United States participation in the *Orr Ditch* case.

The unavoidable lack of finality in the court's analysis of the res judicata defense raises a serious question about the jurisdiction to adjudicate water rights. The court acknowledged that the res judicata exception that it relies upon may be seen from a "second perspective," namely, " 'the tendency of courts to see some of these questions in the context of necessary parties issues.' " (Nev. App. 231a, n. 14, quoting from Restatement (Second) of Judgments §86 (Tent. Draft No. 2, 1975) Reporter's Note at 79.) If a tribe is a necessary party for the final adjudication of federal reserved rights and the tribe does not intervene in the suit and sovereign immunity prohibits its joinder as a party, then the suit could be dismissed for failure to join an indispensable party. *See, e.g.*, Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure.

The court stated that "due process should prevent preclusion of the Indians to the extent it would protect similarly represented non-Indians" and that "the represented person is precluded unless there is fraud or collusion in the prior proceeding." (Nev. App. 236a and 230a, n. 13.) The court of appeals should have held that the final decree in the *Orr Ditch* case was binding upon all parties and persons in privity to parties unless there was collusion between the parties or fraud upon the court.

CONCLUSION

The Ninth Circuit Court of Appeals has recently closed the courtroom door to the adjudication of federal water right claims in most western states by finding that the statutory waiver of sovereign immunity in the McCarran Amendment in the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. §666, was impliedly

repealed by the Act of August 15, 1953, 67 Stat. 589, 25 U.S.C. §1322(b) and 28 U.S.C. §1360(b). *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3965 (U.S. May 21, 1982) (No. 81-2188), and *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3949 (U.S. May 5, 1982) (No. 81-2147).

In this case the court has bolted the door shut by possibly allowing tribal sovereign immunity to be used to avoid the full and final adjudication of federal water rights where the United States could claim potentially conflicting rights. The court has also opened the back door of the courtroom to allow the United States or Indian tribes to re-litigate water right claims that have been or could have been previously adjudicated.

The *amicus curiae* State of New Mexico requests the Court to grant the Petition for Writ of Certiorari filed by the State of Nevada.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter Thomas White, hereby certify that I am a member of the bar of this Court and that I am counsel for the amicus curiae State of New Mexico and that on August 6, 1982 I mailed by first class mail, postage prepaid, copies of the foregoing Amicus Curiae Brief to the following counsel of record:

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